IN RE ARBITRATION BETWEEN:

TEAMSTERS LOCAL #320

and

CITY OF ANDOVER

DECISION AND AWARD OF ARBITRATOR

BMS 10-PA-0107

JEFFREY W. JACOBS
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ARBITRATOR

October 22, 2009

IN RE ARBITRATION BETWEEN:

Teamsters Local #320,

and

DECISION AND AWARD OF ARBITRATOR
BMS Case # 10-PA-0107
Matthew Krattenmaker Grievance

City of Andover.

APPEARANCES:

FOR THE UNION:

Paula Johnston, Attorney for the Union
Matthew Krattenmaker grievant
Curt Swenson, Business Agent
Scott Protivinsky, Steward, Utilities Dept.
Jeff Okerstrom, Street Dept.
Matthew Anderson, Utilities Dept.
Steve Weinhold, Utilities Dept.

FOR THE CITY:

Scott Baumgartner, Attorney for the City
Jim Dickinson, City Administrator
David Berkowitz, Director of Public Works/City Eng.

PRELIMINARY STATEMENT

The hearing in the above matter was held on September 28, 2009 at the Andover City Hall. The parties presented oral and documentary evidence at which point the hearing record was closed. The parties submitted Briefs dated October 13, 2009 at which point the record was closed.

ISSUE PRESENTED

The parties stipulated to the issue as follows: Did the Employer violate Section 15.1 of the contract when it laid off the grievant instead of a member with less job classification seniority? If so, what should the remedy be?

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from January 1, 2009 through December 31, 2009. Article VI provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the State of Minnesota Bureau of Mediation Services. At the hearing the parties stipulated that there were no procedural or substantive arbitrability issues and that the matter was properly before the arbitrator.

UNION'S POSITION

The Union's position was that the City violated Section 15.1 when it laid off the grievant instead of a junior employee. In support of this position the Union made the following contentions:

1. The grievant was hired on February 22, 2005 and has greater seniority than two other unit employees in his job classification. Two other employees, one in the Parks Department and one in the Utilities Department, but also within the same job classification of Maintenance Worker were hired after the grievant and have less job classification seniority.

2. The Union pointed to the language of Article 15.1 which reads as follows:

> Job classification seniority will be the determining criterion for layoffs when the job-relevant qualification between employees are relatively equal.

3. The Union asserted that the grievant's job relevant job qualifications are in fact relatively equal to those of the junior employees in the same job classification. He has frequently assisted people in other Departments, both Utilities and Parks and is familiar with their equipment and their job duties. Moreover, it is not unusual for people within the maintenance job classification to help one another. Thus, the Union asserted that since the grievant's qualifications were relatively equal he should have been retained over one of the junior employees in the same classification.

4. The Union asserted that the City cannot use Department seniority to determine who should be laid off; yet that is precisely what they did. See Joint Exhibits 1 and 3. The Union argued that to read the language of Article 15.1 as the City wants would render it meaningless. If the job relevant qualifications between Departments are by definition not "relatively equal" the language requiring job classification seniority is effectively taken out of the contract.

5. The Union further asserted that there is no provision for "Department seniority" even though that is quite apparently the way in which the City determined this layoff. Article 7.6 defines seniority as "length of continuous service in any of the job classifications covered by Article II – RECOGNITION." Article II provides for two job classifications, i.e. Mechanic (which is not involved in this case) and Maintenance Worker.

6. Thus all of the workers in the Maintenance Worker job classification, including the grievant and the two junior employees who work in the Parks and Utilities Departments respectively, are to be considered based on their job classification seniority. There is no consideration of "Department seniority and no contractual provisions for Department seniority. Thus it does not matter what the seniority is within each Department; but rather only what the employees' seniority date is within the overall Maintenance Worker classification.

7. The Union further asserted that the job descriptions of the various positions within the Maintenance Worker classification are virtually the same. The overall job description found in the first page of each such job description provides as follows: "Perform a variety of unskilled or semi-skilled maintenance work, and operate a variety of equipment in the construction, operation, repair, maintenance and replacement of City water, sewer, street, park and storm drainage facilities and systems." The Union noted that this is the same for literally all of the job descriptions for the Maintenance Workers whether they are in Streets, Utilities, Parks or Vehicle Maintenance.

8. When one looks at the variations for each Department, called Department Variations, it becomes apparent that while there are some licensure and other qualifications required on paper, they do not in fact work that way in practice. Thus, while the Parks employees are "required" to have a tree inspector license only 2 of the Parks employees even have one and the one junior employee in that Department does not have such a license. The Union pointed to several other examples where the employees in the Department do not possess the "requirements" found in the job descriptions.

9. The Union also pointed to the so-called special requirements in the various descriptions and noted that the grievant in fact has a Class B driver's license as required by the Parks Department with an air brake and tanker operations endorsement. He does not currently have a hazardous materials endorsement but could easily get it. The special requirements language allows for 6 months to get the needed licenses upon hire so the grievant could certainly get this endorsement within that period if placed in that position.

10. With regard to the Utilities Department, the Union again pointed out that several of the current employees do not possess all of the requirements found in the Department Variations section. See, Union Exhibit 6.

11. Moreover, the job descriptions allow for up to one year from hire to get such licensure and the grievant could easily obtain such licensure if he were to be retained. He either currently has or could easily get the needed requirements in either the Parks or Utilities Departments.

12. Further, as noted above, the actual duties overlap considerably and the grievant testified that he is familiar with many of the tools and equipment used by other Departments and could easily be trained on the job, just as the employees in those Departments were when they were hired.

13. Thus while the grievant has the lowest seniority in the Streets Department, he is 3rd from the bottom in the job classification and it is only the classification that is relevant for purposes of layoff. Moreover, the Union argued that his job relevant qualifications are certainly at least equal to those junior workers who were retained. The Union asserted finally that the City made no showing that the grievant could not perform the job nor that the employees retained were somehow so significantly more qualified that their job relevant qualifications were not relatively equal to those of the grievant.

14. The Union argued that the terms "relatively equal" does not require that the job relevant qualifications be absolutely identical and only requires that the qualifications be approximately the same in order to bring seniority into play as the determinative factor. Here the Union asserted that the grievant clearly has the ability to perform most if not all of the job duties in both Parks and Utilities currently. He has a demonstrated ability to do these jobs and could easily get any necessary licensure found in either of those position descriptions. Under these circumstances, the Union argued, the grievant's qualifications are at least relatively equal to those of the junior workers. Further, the Employer did not provide any evidence that the junior workers were in fact substantially better than those of the grievant.

15. The Union seeks a remedy placing the grievant into either the position held by the junior person in the Parks or Utilities Department, whichever the arbitrator determines.

The Union seeks an award reinstating the grievant in either the Parks or Utilities Departments in the positions held by either of the junior employees in those Departments depending on which of those positions the arbitrator determines is appropriate along with full back pay and accrued benefits.

CITY'S POSITION:

The City's position was that there was no violation of the labor agreement herein. In support of this position the City made the following contentions:

1. The City also pointed to the language of Article 15.1 but asserted that this language coupled with the management rights clause gives it the right to determine if job relevant qualifications are relatively equal. The City asserted that by definition the job relevant qualifications are not equal because the grievant is in a different Department in the Maintenance Worker job classification.

2. The City further argued that there is no provision for "bumping" in the labor agreement and that the Union is essentially seeking to have the arbitrator add one. Since no such provision exists, there can be no contractual way for an employee to bump another employee out of a job upon layoff.

3. The City pointed out that budget constraints required that a position needed to be cut. The City determined that a position in the Street Department would have to be cut in order to meet its budget shortfall. The City pointed out that the Union is not, and cannot, challenge the decision to eliminate the position. The City retains the right to make that determination.

4. The City determined that the personnel already in the remaining jobs were the best fit. The City pointed to Article 5.1, which provides as follows: The Employer retains the full and unrestricted right to establish and modify the organizational structure; to select, direct and determine the number of personnel." The grievant is the most junior person in the Streets Department and as such he was the person to be laid off as the result of the elimination of the position.

5. The City further argued that Article 15.1 does not require that seniority be used under all circumstances but rather only when the "job-relevant qualification between employees are relatively equal." Here the City asserted that the job relevant qualifications cannot be equal since the grievant and the two junior employees work in different Departments. Therefore, by definition the qualifications cannot be relatively equal since they perform different jobs.

6. The City further asserted that while employees in different Departments help each other, the grievant has not in fact performed all of the functions in either the Utilities or the Parks Departments. The employees in those Departments are trained to perform their jobs and have already been shown to be the best fit to achieve the greatest efficiency in those jobs.

7. The City further asserted that the position descriptions set forth the requirements of the job and are not to be taken lightly. The City asserted that even though some of the job duties appear similar they are not the same. They are very different jobs with different requirements and skills necessary to perform them.

8. The City further noted that the grievant has not in fact performed all of the functions in other Departments even though he has helped. Further, where he has assisted, it was usually in a supporting category and did not perform that part of the jobs where special skills are needed or helpful. Thus, the City argued, the Union did not show that his job relevant qualifications are relatively equal.

9. The essence of the City's argument is that the language of article 15.1 only requires that seniority be used if, and only if, the job relevant qualifications are relative equal and that the grievant's qualifications are not relatively equal to the junior employees because they work in different Departments and perform different jobs. Therefore the City retained the right to layoff the most junior person in the Department. Job classification seniority does not apply here.

The City seeks an award of the arbitrator denying the grievance in its entirety.

DISCUSSION

The facts of the case are straightforward. The grievant was hired by the City on February 22, 2005. He is the third from the bottom of the seniority list in the Job Classification of Maintenance Worker. He is employed in the Streets Department of the City and is the junior most employee in that Department. There are two other more junior workers in the job classification. One employee works in the Utilities Department and the other in the Parks Department. There was no dispute over their respective hire dates; they are junior to the grievant.

The contract clause at issue here is clear and unambiguous. It requires simply that "Job classification seniority will be the determining criterion for layoffs when the job-relevant qualification between employees are relatively equal." The Union is correct that Department seniority is not the determining factor. Further, the City's argument that the management rights clause gives it the right to determine which employee to layoff in this situation was unpersuasive. It is axiomatic that while the management rights clause reserves to the Employer certain rights to direct and manage the workforce, it is specifically limited by those provisions of the labor agreement to the contrary. Here, the general management rights clause is limited by the clear provisions of Article 15.1 cited above. Thus, the ultimate question is whether the job relevant qualifications of the grievant are relatively equal to those of the junior employees.

Elkouri notes that a "relative ability seniority clause," as this is, does not require absolute equality in ability. Elkouri notes as follows:

> "Modified seniority clauses fall into one of three basic categories. In one category are the clauses that provide in essence that the senior employee shall be given preference if he or she possesses fitness and ability equal to that of junior employees. This type of cause might be termed a "*relative ability*" clause, since here comparisons between qualifications of employees bidding for the job are necessary and proper and seniority becomes a factor only if the qualifications of the bidders are equal.

> The wording of these *"relative ability"* clauses varies. The contract may provide that seniority shall govern unless there is a marked difference in ability, or unless a junior employee has greater ability. Some clauses provide that seniority shall govern if ability (or other qualifying factors such as physical fitness, competence, etc.) is *relatively equal*, or *substantially equal* or simply *equal*. Even in the latter regard, however, it has been held that the term "equal" does not mean exact equality, but only substantially equality. Nor does "relatively equal" ability mean "exactly" equal ability. Thus whether the term used is "equal" or relatively equal," or "substantially equal'" it would appear that only an appropriate or near equality of competence, rather than an exact equality, should be necessary to bring the seniority factor into play. Elkouri and Elkouri, *How Arbitration Works*, 5th Ed. at p.838.

Thus, the fact that the grievant may not have the exact same abilities as junior employees is not necessarily the determinative factor. Elkouri goes on to cite examples where a senior employee was allowed to bump a more qualified junior employee under such a clause and where a junior employee was retained only where it was shown that the junior employee was substantially superior to the senior employee. Id at fn. 154 and 155. Moreover, even though the discussion in Elkouri regarding relative ability clauses centered on bumping and promotions, the same analysis applies to the layoff situation, especially here where the very term relatively equal is used in this labor agreement. It is quite clear that the language contemplates that seniority is the determining factor where the senior employee possesses ability and fitness for the job that is relatively equal to those of the junior employees.

The question under this language is whether the grievant's abilities are relatively equal to those of the junior employees.

As will be discussed more below, the totality of the evidence showed quite clearly that they were and that the grievant should have been retained and that a more junior employee should have been appropriately laid off even though they were in different Departments within the same job classification.

Here it was clear from the evidence as a whole that the City regarded Department seniority as one of, if not *the*, determinative factor in determining which employee to layoff. The letter dated July 21, 2009, Joint Exhibit 3, makes reference to the fact that the grievant is the lowest in seniority in the Streets Department and that this was the reason he was laid off. Significantly, there is not even any reference in that letter to the relative ability of the grievant as compared to the junior employees. While that is not determinative in and of it, the substance of that letter coupled with the testimony of City witnesses at the hearing showed that the City regarded Department seniority as the most significant factor. The problem for the City in this regard is that Department seniority is not to be used to determine which employee to layoff in this scenario – job classification seniority is.

It was clear that the City was attempting to retain what it believed to be the right employees for the remaining jobs. Certainly, in times of shrinking budgets and bad economic times, it is critical that the city have the personnel in the field who can perform the jobs at hand. It was further clear that this was what motivated the City's action here and that it was done in a good faith effort to keep services at a high level while at the same time effecting the cost savings necessitated by budgetary constraints. Having said that however, one simply cannot ignore the clear provisions of the labor agreement. Once again, there must be a determination of whether the job relevant qualifications are relatively equal.

The grievant has experience in similar positions in other public employers and the evidence shows that he has performed work in other Departments. The evidence further showed that this is a regular occurrence and that workers frequently help employees in other Departments.

The evidence showed that the job descriptions between Departments within the job classification of Maintenance Worker are very similar if not identical in many material ways except for what are known as Departmental Variations. See Union Exhibits 3, 4 and 5. These will be discussed below. There are also "Special Requirements" contained within each of the various Departments.

Sixteen of the seventeen Essential Duties and Responsibilities in the Streets Department, where the grievant had worked until he was laid off, and the Utilities Department are identical. The only additional requirement found in the Utilities Department is as follows: "As a representative for the City of Andover provide excellent customer service to external and internal customers."

Significantly, the City provided no evidence that the employees in Utilities are somehow specially trained in this regard or would be better than the grievant already is in this regard. On this record, it was clear that the grievant's abilities In this regard are relatively equal.

The Essential Duties and Responsibilities in the Parks Department are similarly virtually identical. There was no evidence on this record that the grievant could not perform these duties. In fact there was some evidence that he can and in fact has. There was no evidence on this record that the grievant was unable or unwilling to perform any of the essential duties of either Parks or Utilities.

It is essential now to examine the differences in these Departments. The City argued that these special requirements and variations make the job relevant qualification different almost by definition. The evidence showed however that these special requirements and Departmental variations are adhered to loosely at best in many cases.

In the Utilities Department the one Special Requirement the grievant does not have is a sewer and water license. He already possesses a Class B driver's license, as will be discussed more below. The language of the Utilities Special Requirement clearly provides as follows: "must obtain a sewer and water license within 1 year of appointment." There is no limiting language on whether that applies to a new appointment or a transfer from one City Department to the Utility Department. The evidence showed however that the grievant could obtain such a license and could do so well within one year of appointment. Thus the evidence showed that in terms of licensure and the ability to perform the essential functions of the job, the grievant was relatively equal to the junior employees.

Turning to the so-called Departmental Variations, the evidence again showed that the grievant's job relevant qualifications were at last relatively equal to the junior employees. The grievant provided credible testimony that he has performed a majority of the functions already listed on the list of special variations. Those that he has not performed, the evidence showed that he could be trained to do so in a reasonable period of time. Further there was no evidence that the junior employees were not given the same opportunity to train for those functions.

Finally there was no showing whatsoever that the employees had to have been able to perform all functions of the job at the very moment they were hired. Indeed, the evidence was to the contrary; as the licensure discussion showed above. The evidence showed that the employees hired into this Department are given a reasonable opportunity to demonstrate the ability to perform the job. The point here is that the Union made a prima facie case that the grievant's job classification qualifications were relatively equal to the qualifications of the junior employees. On the other hand, the City did not assail the grievant's qualifications other than to simply assert that he works in a different Department and had not performed all of the job duties in the Utilities and Parks Departments. As noted herein, the evidence showed that neither of the junior employees had either when they were hired and there was no evidence that they have ever performed them.

Turning to the Parks Department and the Special Requirements section, it was apparent that the grievant either already has or can easily get the licenses required of this position. That language provides as follows: "Must possess a Class A or B commercial driver's license with air brakes, tanker operations and hazardous materials endorsement or the ability to obtain such within six months." The grievant has a Class B license with air brakes and tanker operations endorsements. He testified credibly that he can quite easily get a hazardous material endorsement within the 6 months required in that language.

The Variations Section also apparently requires Parks employees to have a Tree Inspector license. Again, only two of the five employees even have such a license. Moreover, the Parks employee who is junior to the grievant does not possess such a license and apparently never has even though he too has been with the Department for well over a year. Also, while the junior employee the Parks Department is a certified Playground Safety Inspector it was clear that the City has seen fit to get by for many years, perhaps as long as anyone knows, without anyone holding this certification. The evidence showed that the City has saved some money because of this and can now use its own personnel to inspect playgrounds and this cost savings is certainly a factor to consider and one which makes the City's desire to retain that employee understandable. However, there was no evidence that the grievant could not obtain such certification; indeed, the junior employee was hired without it and obviously was given considerable time to get one. On balance, the Union's argument here has merit; this factor does not outweigh clear contract language.

Further, while the Department Variations Section of the job description showed that the Park employees should have a pesticide applicator license, only two of the five employees in the Parks Department even have such a license. See Union Exhibit 6, the letter from the City's Human Resources Director to the Union dated September 16, 2009. The one employee in the Parks Department who is junior to the grievant does not possess such a license currently and he was hired on September 6, 2005, See Union Exhibit 2.

There was some evidence that the junior employee in Parks is a National Playground Safety Inspector and that certainly gives the City some advantages and results in a cost savings. He was apparently the only person in the Department with such a license however so there was no evidence that this was a "requirement" of the job since nobody else has one even though several of the Parks employees have been with the City for many years. See Union Exhibits 2 and 6.

Clearly, the grievant does not have a horticulture or landscape background and the evidence shows that the Parks Department employees do have such backgrounds, although it was not entirely clear on this record what that meant; i.e. whether there was an educational requirement or vocational background or some other more objective requirement. Thus, the lack of such a background, especially in light of the multi functional nature of the job, was not the sole factor to be considered.

It must be remembered that the job relevant qualifications must be "relatively equal." If they are then seniority comes into play. There is no requirement that the grievant have more qualifications or that he be somehow "head and shoulders" above or significantly better than the junior employees in terms of his abilities – only that his job relevant qualifications be relatively equal. On balance, it was clear that they were and that job classification seniority should have been used to determine the appropriate person to layoff once the position was eliminated herein.

As a final note, the City clearly wanted to use Department seniority and argued that by definition, the very fact that the grievant works in a different Department renders his job relevant qualifications not relatively equal to those of the junior employees. The Union is also correct that a reading of the contract that would render the clause meaningless is disfavored. Elkouri notes as follows: "Arbitrators seek to interpret collective bargaining agreements to reflect the intent of the parties. … Constructions favoring the purpose of the provision are to be favored over constructions which tend to conflict with the purpose of the provision. Elkouri 5th Ed at 479-80. Here it is clear that the purpose of the provision at issue is to give preference to senior employees if they possess relatively equal abilities to perform the work. The City's interpretation, as noted herein, would effectively nullify that provision as between employees in different Departments despite the absolutely clear provision requiring that job classification seniority be used.

Further, Elkouri notes, and it is axiomatic, that an arbitrator must give effect to all words and clauses contained in the labor agreement wherever possible.

> "If an arbitrator finds that alternative interpretations of a clause are possible, one of which would give meaning and effect to another provision of the contract while the other would render the other provision meaningless or ineffective, the inclination will be to use the interpretation that would give effect to all provisions. It is axiomatic in contract construction that an interpretation which tends to nullify or render meaningless ay part o the contract should be avoided because of the general presumption that the parties do not carefully write into a solemnly negotiated agreement words intended to have no effect.. Id at 493. (Citing Arbitrator John Updegraff in *John Deere Tractor Co*., 5 LA 631, 632, (1946).

There is considerable merit to the Union's argument in this regard. If the City's argument on this is accepted it would effectively negate the language of Article 15.1 insofar as it requires that job classification seniority be used. Using the City's analysis, if employees in different Departments could never be relatively equal in ability then job classification seniority would never be used – a layoff could only be done by *Department* seniority and that is not what the language requires.

Moreover, it is for the arbitrator to determine the issue of relative ability. It is not as the City suggests, left to its ultimate discretion. Had the parties desired that this decision be left to the City, subject only to some other form of review, such as arbitrariness or the like, such language could easily have been added. Here however, no such limitation appears in the language. Thus, taking the evidence as a whole, as a factual matter, the Union showed a preponderance of evidence that the grievant's job relevant qualifications are relatively equal to those of the junior employees. Given the clear and unambiguous language requiring that job classification seniority, not Department seniority, be used to make the determination under those circumstances, the grievant was not the appropriate person to be laid off.

The City further argued that there is no provision for bumping in this contact so the grievant cannot be appropriately placed in another Department. This argument is simply misplaced. The City breached the labor agreement. It is basic contract law and certainly well within the body of labor law, that for a contract breach there must be an appropriate remedy.

Further, the fact that there is no bumping procedure here does not prevent the conclusion that the grievant should have been retained. Elkouri again provides considerable guidance on this question as follows:

> "Arbitrators have emphasized that, absent any contractual provision permitting it, senior employees have no right to bump junior employees merely because the senior employee wants the job of the junior employee – no layoff being involved. However, it has also been emphasized that, in the absence of any contractual prohibition, 'it is almost universally recognized that senior employees, under a plant-wide seniority system, have the right to bump junior employees from their jobs in order to avoid their own layoff, provided they can perform the work of the juniors." Id at p. 772.

Here the "plant wide" seniority system appears to apply to the job classification and the above-cited analysis fits here almost perfectly. Thus, even though there is no specific bumping provision, once it has been determined that the job relevant qualifications of the senior employee are "relatively equal" the result follows from the clear language of the agreement to layoff the junior worker and retain the senior employee. That may seem a harsh result for the junior employees who are, by all accounts, doing well at their jobs but that is what seniority systems are frequently all about.

Moreover, the parties specifically gave the arbitrator the power to fashion a remedy. It has long been the law under PELRA that an arbitrator has the power to fashion an appropriate remedy when one party has violated the labor agreement. This case falls squarely within that basic tenet of labor arbitration.

For every contractual violation of this nature there must be a way to remedy it. Here the most reasonable way to do that given the clear violation by the City is to reinstate the grievant within the Maintenance Worker job classification with the City with full back pay and accrued contractual benefits from the date of the layoff herein.

The evidence showed that employees are frequently hired without the necessary licensure contained in the various job descriptions and are given time to obtain those licenses. Thus the fact that the grievant does not possess all the licenses needed in some Departments does not disqualify him from being placed there.

Moreover, the evidence showed that some workers in these Departments do not have all the licenses now even through they have been with the City for several years. The grievant is thus to be given the time period provided for in the job description within which he is placed to obtain the necessary licensure for that position.

The arbitrator is without jurisdiction to order the City to layoff another worker even though the City did eliminate a position in the classification. Since there is no contractually prescribed procedure regarding bumping other than the language of Section 15.1, it is not for an arbitrator to insert one. What is clear is that the City violated Section 15.1 when it laid off the grievant who is senior to at least two other bargaining unit employees and it was shown that his qualifications are relatively equal to those junior workers. The grievant is to be reinstated to a position within the Maintenance Worker Job Classification with all back pay and accrued contractual benefits and is to be made whole in all respects. The determination as to whether to layoff another worker in the face of this decision is left to management but any such action is to be consistent with this Award.

AWARD

The grievance is SUSTAINED. The grievant is to be reinstated to a position within the Maintenance Worker Job Classification with all back pay and accrued contractual benefits and is to be made whole in all respects as set forth above.

Dated: October 22, 2009

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Jeffrey W. Jacobs, arbitrator

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